No. 14,500

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application of L. B. & W. 4217; and the Application of JONES, WILSON AND ERVIN, d/b/a "THE CLUB" for Beverage Dispensary License.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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JURISDICTION.

This is an appeal taken from a decision and order (R. 17-22), denying the appellants' application for renewal of a liquor license under Alaska Statutes.

The District Court had jurisdiction in the proceeding by virtue of the provisions of Section 35-4-12, et seq., as amended, Alaska Compiled Laws Annotated, 1949, and Title 48, U.S.C.A., Section 101.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of said appeal by virtue of the provisions of Section 1291 of Title 28 of the *United States Code* (as amended Oct. 31, 1951, c.

655, Sec. 48, 65 Stat. 726). This appeal is governed by Section 1294 of Title 28 of the *United States Code* (June 25, 1948, c. 646, 62 Stat. 930, as amended Oct. 31, 1951, 65 Stat. 727).

STATEMENT OF THE CASE.

Appellants, in 1953, held a beverage dispensary license issued under applicable statutes of Alaska.

In December, 1953, Wilson, one of appellants, acting on behalf of all, presented to the Clerk's office in Anchorage an application for renewal of that 1953 license. Upon the assurance of an employee of such office that such application could be filed any time before June 30, 1954, Wilson, for the reasons appearing in the record (R. 14, R. 21, R. 32) did not then file the application (R. 3-9, R. 9-11). The information given to appellants by a member of the Clerk's staff (R. 14, R. 21 and R. 32) is not controverted.

Having relied upon such information, appellants, in April, 1954, filed their application (R. 3-9 and R. 9-11) for renewal of the 1953 license. Hearings by the Court were held upon such application (R. 15-16, R. 24-36) and resulted in a denial of appellants' request for renewal of their license. The reasons adopted by the trial Court in denying the application appear in the record at pages 25, 26, 34, 43 and 45.

From this denial (R. 17-22), appellants have appealed.

ARGUMENT.

I.

THAT THE COURT ERRED IN DENYING APPELLANTS' APPLICATION FOR THE REASON, AS STATED IN THE COURT'S OPINION, A RENEWAL UPON APPELLANTS' APPLICATION COULD NOT BE ALLOWED, FOR THE REASON THAT THE LICENSE FOR THE PRIOR YEAR HAD EXPIRED, AND THERE WAS, THEREFORE, NO VALID EXISTING LICENSE TO RENEW.

Prior to the license year 1954, the District Court, Third Division, had granted renewals of liquor licenses whether the applications therefor were filed and acted upon before or after December 31st, which, under territorial law, was the expiration date of all liquor licenses. By granting renewal of licenses upon applications filed after the expiration date of the prior license, the Court had established precedent for the practice noted.

Section 35-4-12, et seq., of Alaska Compiled Laws, Annotated, 1949 prescribe generally the qualifications of applicants and the manner of issuance of liquor licenses.

While the 1953 legislature adopted several amendments to the liquor code of Alaska, no substantial changes were made. Licensees' qualifications were not changed. With at least presumptive knowledge of past practices, the 1953 legislature adopted the following amendment:

> ". . . no further proof of the consent of the citizens of the place . . . will be required . . . from year to year so long as the licensee shall not have been found guilty of an infraction of the Territorial liquor laws; provided, applicant

> shall file a sworn statement to the effect that applicant has not been convicted . . ."
>
> —Chapter 131, Session Laws of Alaska, 1953.

This amendment represents a liberalization of the old renewal provisions, notwithstanding the precedent and prior practices of handling such applications. If the legislature had intended more rigid consideration of renewal applications, why, then did it not act? The answer to this question appears, at least presumptively, to be that the legislature approved of the prior practice in renewal of licenses.

Another provision of our code, which is appropriate, is found in Section 35-4-15(8), supra, which reads:

> ". . . and all licenses thereafter shall be issued for the fiscal year, ending December 31, but *no license shall be issued for less than one-half year.*" (Emphasis supplied.)

The cited statutory provisions make no distinction between "new" or "renewal". The necessary implication of this phraseology is that a license may be issued for less than a full fiscal year. With knowledge of the interpretations applied by the Court to the then existing provisions, the legislature should have included specific limitations on the procedures to be followed in renewing licenses.

Instead, the 1953 legislature, in effect, rather than restricted, liberalized the law relating to renewals.

The present law must be construed, if at all, as a whole and not dissected into numerous parts, each

of which may be examined and interpreted separately. The context as a whole must control, and if the law is deemed incomplete, the trial Court had neither the duty, nor the jurisdiction, to exercise legislative functions.

Upon the proposition that the whole context of an act must be construed the attention of the Court is called to *Barron v. Kaufman,* at page 788, where it is said:

> "To give the section the construction contended for by appellant there would have to be read into it the words 'for each meeting attended.' It must be presumed that the Legislature intended the meaning the words they actually employed express, *as read in conjunction with other clauses and sentences of the section.* The interpolation of words into an act by construction is allowable only when it is necessary in order to rescue the enactment from an absurdity. . . ." (Emphasis supplied.)
>
> —*Barron v. Kaufman* (Ky.), 115 S.W. 787.

In the proceedings appealed from, the trial Court violated this basic rule of statutory construction by isolating the word "renew" or "renewal". In the Bordenelli opinion to which the trial judge (R. 20) referred, the words "renew" and "renewal" are defined as follows:

> "Webster's New International Dictionary, Second Edition, defines the word 'renewal' n. 'renewing, or state of being renewed'. The same authority defines the word 'renew' v. transitive:
>
> (1) To make new again; to restore to freshness, perfection, or vigor; also, to begin again

as new; to reassume; as, to renew one's strength.

(2) To make new spiritually; to regenerate . . .

(3) To restore to existence; re-establish; re-create; rebuild; as, to renew the old splendor of a palace; to revive; to resuscitate; as, to renew the sentiments of youth.

(4) To repeat; to go over again; to make or do again . . .

(5) To begin again; to recommence; to resume . . .

(6) To replace; also, to restore to fullness or sufficiency . . .

(7) To grant or obtain an extension of; to continue in force for a fresh period."

This Court in the case of *Campbell River Timber Co. Ltd. v. Vierhus,* 86 F. 2d 673, in speaking of a different situation involving the Internal Revenue Code, adopted a similar definition in the word renewal.

The Court in the Bordenelli opinion further stated:

> " 'The term "renewal" has no strictly legal or technical signification, and it is not a word of art. It may be given different meanings, and it has different meanings, varying with the subjects with reference to which it is used. The cases construing the proper meaning to be ascribed to the term are by no means uniform; contracting and the construction is controlled by the intention of the parties.' "

In the decision herein, the trial Court stated:

> "However, this court is of the opinion that the definition of the word 'renewal' must be strictly construed, therefore, as defined and construed by this court see memorandum opinion of Tony Bordenelli and Eyvohn Bordenelli . . ."

Strict construction of the word "renewal", which, as stated by the trial Court, has no strictly legal or technical signification, makes manifest the inconsistencies of the rules and interpretations adopted by the Court.

Our statutes, Section 35-4-12, et seq., Alaska Compiled Laws Annotated, 1949, and Chapter 131, Session Laws of Alaska, 1953, supra, impose no condition as to the date when an application must be filed. Since applicants had committed no infractions of the law and since no protests have been filed (R. 29) they were entitled to a license.

This case differs from the case of Bordenelli, cited by the Court (R. 19) where protests had been filed and a license revoked. Without commenting upon the merits of this decision, it is sufficient to say that the situation here presented differs materially from that, in the circumstances outlined, and also with reference to misleading information furnished these appellants by a Court officer, more fully considered under Point III.

The Court's attention is invited to the case of *Schroeder v. O'Neill, et al.,* which is a case where licensees of the board of township commissioners re-

lied upon resolutions extending time of building upon lots, until a year after the termination of certain litigation. There, at page 683, the Court commented:

"'It should require circumstances of a very strong and controlling character to induce the Court to reverse a rule long in existence in this state in regard to property.' Elkin v. So. Ry. Co., 156 S.C. 390, 153 S.E. 337 . . .

"It would seem unjust and inequitable to the lotholders who had paid $100.00 each for their licenses and who until after this suit was brought continued to pay their annual assessments of $10 a year on these lots; which payments were accepted and retained by the board, to hold that these lotholders, who refrained from building, presumably in reliance upon the extension granted them by the board until the controversy should be settled, should lose their rights . . .

"A municipal or other subordinate governmental agency, such as this board of township commissioners, can be bound by an estoppel in cases such as the present. (Citing many cases) . . .

* * * * * * *

"The payment of the initial license fees by these lotholders and annual assessments or renewal license fees of $10 per year per lot thereafter until after the commencement of this action, in reliance upon their license which they had bought, and the official resolutions of the board extending the time to build, coupled with the acceptance of these payments by the board . . . and the board and all other lotholders on the island standing by and permitting these parties to spend their money in the original acquisition and the

renewal assessments, all these would seem to make out a very clear and strong case of equitable estoppel. *It would also be a somewhat inconsistent position for the board, or the two succeeding boards to issue the licenses, accept the payments, extend the time for building, and then claim that the lotholders must be restrained from building or compelled to desist from building.*" (Emphasis supplied.)

—*Schroeder v. O'Neill, et al.* (S.C. 1936), 184 S.E. 679.

The trial Court was, therefore, in error in concluding that appellants' application should be denied because there was nothing to renew, the 1953 license having expired. Upon the statutory provisions cited, supra, an incident of the 1953 license was the right of "renewal" and in the absence of an express statutory provision, appellants could not be deprived of that incidental right or privilege. Since such incidental privilege had not expired by reason of any express provision of the liquor law, the decision of the trial Court was erroneous.

II.

THAT THE COURT ERRED IN RULING THAT APPELLANTS HAD TO FILE AN APPLICATION FOR RENEWAL PRIOR TO THE END OF THE YEAR FOR WHICH A LICENSE HAD BEEN ISSUED, THERE BEING NO SUCH REQUIREMENT IN APPLICABLE STATUTES.

As pointed out under Point I above, our legislature did not specify that a renewal application must

be filed before any specified date. While the liquor business is related to the public good and, therefore, has been construed to be a privilege, it is, nonetheless, a lawful business that cannot be destroyed by unreasonable application of the law. Despite being considered as a privilege, a license does possess some of the attributes of "property". The decision of the trial Court must rest entirely upon proper statutory construction.

The scope of judicial construction is aptly reviewed in the following authorities:

> Mr. Sutherland states: "Thus, the assertion that a statute which is 'clear and unambiguous' needs no interpretation is, in fact, evidence that the Court has considered the meaning of the statute and reached a conclusion on the question of legislative intention. In many cases this will be a proper conclusion but frequently it merely disguises the Court's unwillingness to consider evidence other than the Court's own impression of what the legislative intent is. Court should not lose sight of the fact that statutory interpretation, whatever it may be called, so far as the function of Courts and juries is concerned, is a fact issue. Where available, the Court should never exclude relevant evidence on that issue of fact."
>
> —Sutherland's Statutory Construction, Vol. 2, Section 4502, pp. 316-317.

In this connection, the following passages from the record are quoted (R. 25):

> "The Court. The court wouldn't be interested in that. The court has gone into that and has his

mind made up as to the intent, therefore, it would be a waste of time."

and again at page 26 of the record as follows:

"The Court. No, the court would prefer not to hear it. The court had reason to go into that last fall. You recall the first day I was on the bench I was confronted with this problem, was bombarded about a week or 15 days with every attorney in town on that. I talked to several legislators on it myself and while my opinion may be wrong I do have an opinion."

Mr. Sutherland states further:

"Independent judicial determination arrived at exclusively from the reading of words in the statute does not insure accurate interpretation and thus for the Court to assert that the statute is clear and unambiguous is merely to assert that the statute, as read by the Court, produces a result which is satisfactory to the Court. It does not necessarily mean that as read it reflects the legislative intent."

—Sutherland on Statutory Construction, Third Ed. Vol. 2, Section 4505, at pp. 320-321.

In the cases of

Caminetti v. United States, 242 U.S. 470 (1916);
Diggs v. United States, 61 L. Ed. 442;
Hays v. United States, 37 Sup. Ct. 192,

the Supreme Court of the United States commented:

"Where the language of a statute is plain and does not lead to absurd or impracticable results, there is no occasion or excuse for judicial con-

struction; the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly."

The case of *Palmetto Fire Ins. Co. v. Beha* is a corporate case, the plaintiff being incorporated in South Carolina, and defendant Beha being the Superintendent of Insurance in New York. The latter sought to show a violation of law by the plaintiff and to revoke its license, whereupon plaintiff sought an injunction and the Court, as page 510, commented:

"It may be that the state could provide as a condition of obtaining a license that no licensee could insure cars within the state of New York, *but the statute does not cover such a case.*

"We adhere to our original decision." (Granting the injunction.)

—*Palmetto Fire Ins. Co. v. Beha,* 13 F. 2d 500 (N. Y. 1925).

Appellants recognize that the issuance or renewal of liquor licenses is a valid exercise of police power but they contend that, in the exercise of its discretion, the Court has, by its decision, read into the statute a limitation which the legislature did not set forth. (See R. 34, R. 43 and R. 45.)

The United States Supreme Court cited a leading case, in the following case:

" 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression

or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' "

—*Holy Trinity Church v. United States,* 143 U.S. 459, at page 461, citing *U.S. v. Kirby,* 7 Wall. 482.

In the case of *Boise Street Car. Co. v. Ada County,* an Idaho case, the Court commented:

"Undoubtedly in certain cases the courts do have the power to read words into an act, but it is a power that should be exercised with caution and should be indulged only when the omission is palpable and the omitted word indicated by the context. Where the omission is not plainly indicated and the statute, as written, is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation. 2 Lewis' Sutherland, Statutory Construction, Sec. 382."

—*Boise Street Car. Co. v. Ada County,* 50 Idaho 304, 296 Pac. 1019.

The trial Court, by assertedly construing the word "renewal" strictly, to use the words of Mr. Sutherland, has "reached a conclusion on the question of legislative intention." The Court (R. 26) relied upon information obtained from several legislators, and yet appellants' offer of similar evidence was denied. This certainly was a violation of the rule expressed by Mr. Sutherland, supra, and such evidence should have been accepted by the Court.

The language of the statutes, supra, is neither uncertain nor ambiguous, and interpretation of those provisions, as written, would not lead to absurd or impractical results. Without the trial Court's unnecessary interpretation, the issuance of the license would have followed in accordance with prior precedent and practices in handling such applications. Such result would not have violated any legislative intent that is apparent solely from the law as written. The present decision deprives appellants of properties of considerable value that were acquired and maintained by renewal in prior years under the same provisions on which the trial Court relied, by interpretation, to deny the application. This result certainly is not justified by the trial Court's construction.

III.

THAT THE COURT ERRED IN RULING THAT APPLICANTS DID NOT HAVE THE RIGHT TO RELY UPON THE REPRESENTATIONS OF AN EMPLOYEE OF THE CLERK'S OFFICE OF THIS COURT.

Attention of the Court is called to the affidavit of Richard L. Wilson (R. 14) and his testimony (R. 26-R. 32), and the statement of the Court (R. 32) to the effect that no question was raised as to the truth of such affidavit and testimony, further to the opinion of the Court with reference thereto, (R. 21) and the statements of the Court. (R. 32-33.)

The office of the Clerk of the Court was established by Title 48, Sec. 106 in the following language:

> ". . . Each clerk shall, in his division perform the duties required or authorized by law to be performed by clerks of United States courts in other districts and such other duties as may be prescribed by the laws of the United States relating to the district of Alaska . . . He may appoint necessary deputies and employ other necessary clerical assistance to aid him in the expeditious discharge of the duties of his office, with the approval of the court or judge . . ."

Section 104 reads as follows:

> "The respective judges of the Court shall appoint and at pleasure remove, clerks and commissioners in and for the Territory, who shall have the jurisdiction conferred by law in any part thereof . . ."

The Court, in his opinion (R. 21) refers to such deputy as an officer of the Court and no contention has been made to refute the statement of witness Richard L. Wilson with reference to the misleading information given him. Likewise, appellants' reliance thereon is uncontroverted. Attention of the Court is invited to the case of *Farrell et al. v. Placer County et al.* (Calif. 1944) 145 P. 2d 570. At page 571 (plaintiffs having been told certain things by representatives of the defendant and relying thereon) the Court commented:

> " 'Plaintiffs believed the said representations of defendants made through their agent, . . . and relied thereon and by reason thereof did not for several months after the making thereof, as aforesaid, employ an attorney to recover their

damages for injuries against the defendants, suffered as aforesaid, and did not take any steps or proceedings whatsoever relating thereto.'

"It has been said generally that a governmental agency may not be estopped by the conduct of its officers or employees (10 Cal. Jur. 650, 651) but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. (Citing many cases.) . . . It has been aptly said: 'If we say with Mr. Justice Holmes, "Men must turn square corners when they deal with the Government" it is hard to see why the government should not be held to like standard of rectangular rectitude when dealing with its citizens.' 48 Harv. L. Rev. 1299.

". . . They advised her not to employ counsel, thus lulling her into a sense of security and persuading her not to avail herself of legal assistance in the protection of her rights. . . . Plaintiffs believed and relied upon those statements and conduct of defendants, and as a result, did not consult with counsel or take any proceedings in regard to her claim. It is pertinently said in Times-Mirror Co. v. Superior Court, 3 Cal. 2d 309, at page 331, 44 P. 2d at page 557: 'Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. "It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication." Hum-

boldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 P. 82, citing Story's Equity Jurisprudence, Sec. 28, 439; 1 Pomeroy's Equity Jurisprudence, Sec. 60.'

* * * * * * *

"It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. The conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason."

It would thus appear that the later trend of decisions is definitely to the effect that liquor licenses partake of the nature of property and where one is deprived thereof, he loses something more than a mere privilege, particularly in the case of renewals.

Appellants had the right to rely upon the representations of the office of the Court Clerk and have suffered loss as a result of such misleading information. The judge, in passing upon the application, recognized this fact. (R. 33.)

The case of *Selover v. Sheardown* (Minn.) 76 N.E. 50, is in point with reference to misinformation and the consequent loss of rights by certain parties. In that case one of a group of attorneys was given false information via telegram signed by a United States Deputy Clerk as to an entry of judgment and as a result thereof, the attorneys did not file their appeal in the Circuit Court in time, and thereafter the appeal was dismissed after the attorney and his asso-

ciates had expended several hundred dollars for printing of the record. Thereupon, they sued the deputy for damages, the deputy demurred, the lower Court sustained, and the Supreme Court reversed.

The Supreme Court further commented in the Confiscation Cases (*U.S. v. Clarke*) 20 Wall. 92, 22 L. ed. 320, at page 111:

> "An Act of Congress authorized the employment of the deputy and in general, a deputy of a ministrial officer can do every act which his principal might do."

Appellants in this proceeding certainly relied upon the representations made to them by an officer of the Court and certainly by reason of such reliance acted to their own detriment, losing substantial property rights thereby.

Appellants, having relied upon an officer of the Court, cannot for that reason be deprived of the right of renewal of their license.

IV.

THAT SAID ORDER OF DENIAL IS CONTRARY TO LAW, FOR THE REASON THAT THE COURT DID NOT HAVE THE POWER OR JURISDICTION TO INTERPRET SUCH LAW CONTRARY TO THE SPECIFIC PROVISIONS THEREOF AND IN EFFECT ADD CONDITIONS NOT IMPOSED UPON APPLICANTS BY SUCH LAW.

As set forth above, the legislature for the Territory of Alaska has not set any date for the filing of renewal applications and the law is silent upon this

point. Therefore, by "filling the vacuum" (R. 43) the trial Court here exceeded its power by interpreting such law contrary to the specific provisions thereof and by adding a condition not imposed by such law.

The theory upon which the Court proceeded was that the license held and that applied for were strictly "privileges" without other rights. Such is not correct.

The Court, in the cited Bordenelli opinion, states that a liquor license is not property or property right, but appellants contend that such is no longer necessarily so, however. Incident to that privilege is the privilege of renewal. Under Section 35-4-13, ACLA 1949, liquor licenses are transferable and under many recent decisions partake of the nature of property as well as privilege, particularly in the case of renewals. Section 35-4-13 reads in part as follows:

> ". . . No license issued under the provisions of this Act shall be transferred except after first securing the consent of the Court . . ."

The case of *Rowe v. Colpoys,* (137 F. 2d 249 (1943), 148 A.L.R. 488, at page 491), discussing the incidents of a license "privilege" in connection with a liquor license involved in bankruptcy proceedings, stated:

> "The rule that intangible or incorporeal interests should not be subject to the process of *fieri facias* was applied in the case of such licenses as those of lawyers or physicians to practice their professions and in the case of corporate franchises . . . In the first case, issuance of the license is based upon qualities of personal probity

and professional skill which require the most careful individual scrutiny and forbid transfer under any circumstances."

There the Court was making a distinction between types of license which could be transferred and those which could not. There is an extensive annotation to such case, part of which appears on page 492, as follows:

"The different connection in which the nature of the right conferred by a license to sell intoxicating liquors has been the subject of consideration by the Courts have given rise to a variety of characterizations which, generally speaking, group around the two basic conceptions of 'personal privilege' and 'property'. This difference of opinion as to the legal nature of a liquor license is apparently due to the fact, not always recognized by the Courts, that such license, . . . nevertheless, constitutes a definite economic asset of monetary value for its owner. . . . It is submitted that wherever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute the property element in the license is sufficiently recognized. . . .

"Where statute, providing for issuance of license to sell alcoholic beverages also provided for transfer and assignment of such license, the license was a 'property right' subject to levy. . . .

"But, whether it is a right, the transfer of which is controllable by a Court or by some other authority, it is, nevertheless, a valuable right, with

attributes of property and transferable value in the market of alcoholic beverage distribution. No good reason, either of procedure or policy, has been urged and none is apparent, for exempting this form of property right. . . ."

A definition is found in Words and Phrases, at page 475, as follows:

"A 'license' is not 'property' in the strict sense of the term but it confers valuable rights for which money was paid. City of Carbondale v. Wade, 106 Ill. App. 654."

In the case of *State v. Corron,* 62 A. 1044, 1053, 73 N.H. 434, 6 Ann. Cas. 486, at page 1053 (Atl.), the Court there commented:

"Though a liquor 'license' is technically not 'property' in the sense that it can be taken away by the state without compensation, yet, under the statute it is a valuable right and possesses all other characteristics of property. It cannot be obtained except upon payment of the price, or fee, in cash. . . . It can be taken from the licensee during the year, except for his breach of the conditions upon which it was issued, only by legislative action. Except for the latter possibility, the license is property."

An illustration of the application of these general principles is found in an Arizona case entitled *Oldaker v. Moore et al., State Tax Commission* (Ariz. 1936) 57 P. 2d 1225, where an applicant for a liquor license brought mandamus proceedings to compel the State Tax Commission to issue him a license. The Arizona law provided that no license should be issued

for premises within three hundred feet of a school building, and the Tax Commission, in denying applicant's license for premises near a theatre in which children often congregated relied upon other provisions of the Arizona statutes giving the Commission certain discretionary powers in matters of licensing. The Court, in granting the Writ of Mandamus, stated:

> "We have come to the conclusion that, the tax commission having found that the applicant possesses the qualifications made essential under the statute for the issuance to him of a license, and it appearing the premises in which the business is proposed to be conducted is more than 300 feet from a public or parochial school, it was the plain legal duty of the commission, upon the tender of the license fee, to issue the license to plaintiff.
>
> "If it is thought that dispensing of liquors should not be allowed near theatres and other places where children congregate or visit, the appeal is to the legislature and not to the courts."
>
> —*Oldaker v. Moore et al., State Tax Commission* (Arizona, 1936), 57 P. 2d 1225.

In the *Hathaway* case, the Supreme Court of Florida adopted the same view adhered to by the Arizona Court. In the *Hathaway* case, the plaintiff sought by mandamus to compel the issuance of a license, and upon the facts in that case, the Supreme Court of the State of Florida stated:

> "Administrative agencies, when empowered to do so, may make and enforce regulations to carry

out powers definitely conferred on them, but they are not permitted to do more. The legislature cannot clothe them with more, neither may they assume to do more."

—*Hathaway v. Smith* (Fla. 1948) 35 S. 2d 650 at page 652.

The late Judge Anthony Dimond had occasion to consider what he deemed to be inadequate language in the Territorial Liquor Code covering applications outside of an incorporated city. In reviewing the facts and issues involved in that case, he stated:

"It is notable that with respect to applications for places outside of incorporated cities no showing is required in the application or otherwise, 'as to the integrity of the applicant and the desirability of the issuing of a license for the premises mentioned.' Apparently, all that is necessary is that such an application be in compliance with the law and a majority of the local residents. . . . That the court must exercise lawful and sound, and not arbitrary, discretion in granting or refusing licenses. . . . At any rate, it is obvious that in all cases the provisions of law must control. . . .

"While not necessary to the decision in this case and no opinion is expressed upon the question, the power of the legislature to make the decision of the District Court final in this, or any other case of judicial cognizance is open to question. . . ."

—*Alaska Labor Trades Assn., Inc.,* 10 Alaska at page 472, at page 484.

The Supreme Court of Indiana, in discussing the fundamental principle that Courts cannot impose conditions which are not expressed in the statute, stated in the following language:

> " 'The Courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. *It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however, desirable they may be,* than for judicial tribunals to transcend the just limits of their constitutional powers'. State v. Street R. Co., 146 Mo. 155, 47 S.W. 959; Peoples v. City of Valpariso, 100 N.E. 70." (Emphasis supplied.)

The trial Court, in denying applicant's application repeatedly stated (R. 34, R. 43, R. 45, R. 50), because of the assumed uncertainty and deficiency of the territorial statute, that the Court would in effect have to act as legislature and judge to determine the meaning of the territorial liquor statutes as applicable to this proceeding. Certainly the trial Court's decision, being based at least partly upon such an approach, violates the basic principles outlined in the above cited cases. For cases adhering to rules similar to those in the cited cases and contrary to the opinion of the trial Court see *Alcoholic Bev. Control Bd. v. Pebbleford Distillers* (Ky. 1946) 193 S.W. 2d 1019, *Ex parte Sikes,* 24 L.R.A. 774, *People v. State Racing Commission,* 105 N.Y. Supp. 528.

As the foregoing cases reveal, power to license, in the absence of express statutory authority, does not include the power of prohibition. Neither does that power permit arbitrary and unreasonable exercise of discretion, even if discretion is delegated by statute. Undoubtedly, many cases can be found and probably many will be cited supporting denial of licenses upon the theory of privilege, but the decision of the Court in this case must stand upon statutory provisions which prescribe the requirements which must be met by the applicants.

In the present case, if territorial laws relating to "renewal" of liquor licenses are by the Court deemed deficient, such deficiency must be corrected by the legislature. Since the statutes are silent, the Court cannot assume a legislative function by adding to the code provisions governing the time of filing applications. The trial Court in this proceeding, has attempted in principle, to act, as the Arizona Tax Commission did, beyond the scope of the express provisions of the statute.

Appellants urge that the trial Court, upon the authorities hereinabove cited, erred in denying their application. The decision is tantamount to judicial legislation, in that it supplied, and construed into the statutory provisions, that which was considered missing. This, the Court had no power to do, and its decision, therefore, violates the basic principles applicable to this proceeding.

CONCLUSION.

Upon the applicable statutes cited and the record, together with the general rules of law governing the application of such law to the record herein, the appellants urge that the trial Court erred in its decision and that the same should be reversed, with directions that the application of appellants for the license applied for should be allowed.

Dated, Anchorage, Alaska,
January 22, 1955.

Respectfully submitted,
E. L. ARNELL,
Attorney for Appellants.